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## Abstention, Balancing the Equities, and Armed Conflict in Al-Nashiri: A Reply to Steve Vladeck and Kevin Jon Heller

By Peter Margulies    Wednesday, May 7, 2014, 7:35 AM

There's much common ground evident in Steve's reply to my earlier post on the effort of Abd Al-Nashiri, the accused mastermind of the USS Cole bombing, to enjoin his military commission trial. Steve and I agree that the central question is whether the federal district court should abstain from exercising jurisdiction. Moreover, Steve is clearly right that one can read language in the case law broadly to permit Al-Nashiri's challenge. However, Steve does not fully reckon with the equitable nature of abstention. Equity often involves balancing interests. Here, although Al-Nashiri's interest in avoiding a military commission trial is hardly trivial, it is outweighed by the equities on the other side.

I also share common ground with Kevin Jon Heller, whose post at *Opinio Juris* addresses the merits of Al-Nashiri's argument that the Cole bombing did not occur during an armed conflict and is therefore not triable in a military commission. I'll address Steve first, and then Kevin.

As Steve notes, one shouldn't discount Al-Nashiri's interest. Al-Nashiri's argument that his alleged conduct is not a war crime because it occurred before the start of hostilities is colorable, at the very least. The prospect of enduring the rigors of a military commission trial, only to have an appellate court determine that a military commission was not an appropriate forum, is a significant potential injury that surely counts in any equitable balancing. However, avoiding that harm is not as simple in Al-Nashiri's case as it is in the cases that Justice Stevens cited in *Hamdan I* as permitting federal court intervention, such as *Toth v. Quarles*. In *Toth*, the only factual question was whether the defendant was still a member of the armed forces, and therefore subject to court martial, or was instead a former member of the armed services beyond the reach of military justice. There was no dispute between the parties on this factual point; the Court had an easy time getting to the underlying legal question. In contrast, Al-Nashiri's case entails a determination with far more moving parts.

Steve says little to counter my point that the issue in Al-Nashiri's case---when U.S. hostilities against Al Qaeda commenced---is an intricate question of fact and law that would benefit from a comprehensive record. Moreover, a specialized military tribunal may have insights that would be especially helpful to a reviewing court on the intensity and duration of violence that establish the existence of an armed conflict. Soldiers fight our wars; who better to take an initial cut at pondering what experiences on the ground distinguish war from peace?

If the military commission gets this threshold determination wrong, Al-Nashiri is not without a remedy. The framework that Congress established in the Military Commissions Act will ensure that the military commission's resolution of this legal issue is reviewed by "independent civilian judges," as the Supreme Court urged in *Hamdan I*. An initial determination by a commission, followed by civilian judicial review, can avoid the multiplicitous litigation that would result if a federal court had to compile an elaborate record on the hostilities issue, only to find that Al-Nashiri had not met his burden in seeking preliminary relief. Al-Nashiri would then surely be allowed to submit the same evidence and more at his commission trial, lengthening proceedings in a fashion that Steve rightly decries. Permitting a military commission to compile a record, subject to review by civilian judges, blends accuracy and expedition. Maximizing those two virtues is a goal that Steve and I share. Realizing that goal counsels against premature federal court intervention in Al-Nashiri's case.

Kevin Jon Heller's post takes issue with my argument that the US was involved in a NIAC with Al Qaeda starting with the 1998 cruise missile attacks ordered by President Clinton in response to the East Africa Embassy bombings. As I noted yesterday, there is room for reasoned debate on this point. However, Kevin's argument that there was no significant violence between the US and Al Qaeda between the 1998 Cruise missile strikes and the Cole bombing is unduly stark. As I noted, the 9/11 Commission Report discussed President Clinton's Memorandum of Notification before the Cole bombing authorizing CIA-affiliated tribal assets in Afghanistan to capture Osama bin Laden. Bob Woodward also co-authored a story detailing the CIA's pre-Cole attack provision of funds, equipment, and technical assistance to Afghanistan's Northern Alliance, which engaged in a NIAC with the Taliban and Al Qaeda. Under the International Court of Justice's Nicaragua decision, the provision of funds, equipment, and training add up to the use of force under the UN Charter. Force prohibited by Article 2(4) may not in itself be an "armed attack" under Article 51, but following on the heels of a cruise missile strike against Al Qaeda, it sure sounds like the continuation of an armed conflict.

This analysis preserves the stability of international law. That stability suffers when one party to violence can use the law to reap asymmetric advantages. If Kevin's narrow definition of a noninternational armed conflict (NIAC) were generally accepted, terrorist groups would gain impunity because of the time required to plan and execute attacks. As terrorists plotted, a victimized state would be limited to use of a law enforcement strategy, giving terrorist groups the time and ease to plan further violence. Terrorists, who already disdain the uniforms and insignia that the law of armed conflict has customarily required, should not get further aid from legal doctrine. That asymmetry would incentivize state practice that rolled back the important protections that the law currently provides. Neither Kevin nor I desire that outcome. That's why Kevin should reconsider his unduly narrow definition of armed conflict, which ill-serves hopes we share for a robust rule of law.

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